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May 23, 2014

Jeff S. Jordan
Federal Election Commission
999 E Street, NW, 6th Floor
Washington DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2014 MAY 27 AM 11:50
OFFICE OF GENERAL
COUNSEL

Re: Response to Complaint, MUR 6801

Dear Mr. Jordan:

On behalf of Senate Majority PAC ("SMP"), and Rebecca Lambe in her official capacity as treasurer, this letter responds to the complaint received on April 8, 2014. Because the allegations in this complaint are materially indistinguishable from a number of other complaints the Commission has dismissed, the Commission must dismiss this complaint and close the file.

BACKGROUND

In January 2014, SMP began airing an independent expenditure supporting the election of Congressman Bruce Baley, U.S. Representative for Iowa's first Congressional district and a candidate for Senate in Iowa.¹ The advertisement laments the politicization of healthcare by outside groups and praises the Congressman for his plans to fix existing healthcare laws, lower taxes for working families, and focus on job creation in Iowa. This message was crafted by SMP, independently of any candidate or political party committee. SMP drafted the script and on-screen chyrons from scratch, without incorporating any candidate materials.

TIME	AUDIO	ON-SCREEN CHYRON	VISUAL FOOTAGE	SOURCE OF FOOTAGE
:00 ²	You've seen the ads...out-of-state billionaires playing	you've seen the ads.	Small TV on right side of screen playing attack ad.	Original footage incorporating Americans for

¹ See Senate Majority PAC, *Oil Billionaires*, YouTube (February 19, 2014), <https://www.youtube.com/watch?v=wlv-YvK7I98>.

² *Id.*

	politics with health care...	playing politics with healthcare.		Prosperity attack ad. ³
	The truth?			
:06 ⁴	Bruce Braley knows we need to fix the healthcare law, make it work for Iowa, and hold insurance companies accountable.	Bruce Braley Make Healthcare Work for Iowa Hold Insurance Companies Accountable	Braley talking to constituents outside Braley working on a computer Braley talking to a constituent	Obtained from "Meet Bruce Braley" web video. ⁵
:12 ⁶	He knows we can't go back to letting insurance companies deny coverage for pre-existing conditions and kick people off their coverage when they get sick. That's why...	We can't go back to letting insurance companies deny coverage Kick people off plans	Nurse in medical facility Woman paying bills in kitchen Woman sitting on exam room table	Stock footage
:21 ⁷	...Braley says protecting the middle class comes first with lower taxes for working families and a real focus on job creation in Iowa. Senate Majority PAC is responsible for the content of this ad.	Bruce Braley Protecting the Middle Class Bruce Braley Lowering Taxes Focusing On Job Creation For Iowa's Middle Class Legal Disclaimer	Braley talking to constituent, Braley in factory with worker Braley talking to group outside Braley talking to group around a table Braley walking with farmer	Obtained from "Meet Bruce Braley" web video. ⁸

In providing background visuals for this message, SMP relied on several sources. The ad begins with footage of a television playing an attack ad against Congressman Braley, with silhouetted figures in the background.⁹ Approximately six seconds in, the ad shows

³ See Americans for Prosperity, *Tell Congressman Braley: Obamacare is Hurting American Families*, YouTube (January 14, 2014), <https://www.youtube.com/watch?v=NFv-gDAHMCQ>.

⁴ See <https://www.youtube.com/watch?v=Qvp4jEMwK7w&feature=youtu.be&t=6s> (:06)

⁵ See Exhibit A.

⁶ See <https://www.youtube.com/watch?v=Qvp4jEMwK7w&feature=youtu.be&t=12s> (:12)

⁷ See <https://www.youtube.com/watch?v=Qvp4jEMwK7w&feature=youtu.be&t=21s> (:21)

⁸ See Exhibit A.

⁹ See <https://www.youtube.com/watch?v=Qvp4jEMwK7w&feature=youtu.be&t=:00>. The attack footage was taken from an Americans For Prosperity ad. See Americans for Prosperity, *Tell Congressman Braley:*

footage of Congressman Braley talking to constituents and working at a computer while the ad discusses Braley's commitment to fixing the healthcare law. From the twelve to the twenty-one second mark, the ad shows stock footage of a nurse in a medical facility, a woman paying bills, and a woman on an exam table. The end of the ad shows footage of Congressman Braley interacting with constituents in various settings while the ad discusses the Congressman's focus on policies that benefit the middle class. In total, footage of Congressman Braley appears on screen for less than half of the ad's run time.

SMP obtained the footage of Congressman Braley from a two minute, four second long web video entitled "Meet Bruce Braley," that it downloaded from a publicly available link at BruceBaley.com on January 14, 2014.¹⁰ The video is narrated by Congressman Braley, who speaks about his upbringing and the impact it had on his values and policy priorities as an elected official. The video alternates between footage of Congressman Braley's narration, photographs from the Congressman's childhood, and footage of the Congressman interacting with Iowans in various settings. SMP did not use any of the audio from this video, nor did it use the footage of Congressman Braley's narration. Instead, SMP excerpted eight brief snippets of Congressman Braley interacting with Iowans and integrated these into its own ad. As noted above, the video from which SMP obtained the excerpts was publicly available on the campaign's website and YouTube channel at the time the ad was produced.

DISCUSSION

The complaint alleges that the advertisement republished campaign materials, in violation of 11 C.F.R. § 109.23. But as the Commission's regulations and precedents demonstrate, the incidental use of publicly available video excerpts does not constitute "republishing," particularly where, as here, the excerpts do not contain any discernible message of their own, are used solely to provide background imagery, and make up less than half of the independent advertisement.

The purpose of the republication rule is to "distinguish[] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a

Obamacare is Hurting American Families, YouTube (January 14, 2014), <https://www.youtube.com/watch?v=NFv-gDAHMC0>.

¹⁰ The video was also available on the campaign's YouTube channel. At some point after January 14, 2014, the Braley campaign removed the video from its website and YouTube channel. A copy of the video is included on the compact disc attached to this response as Exhibit A. On January 30th, the campaign uploaded the series of Braley campaign videos referenced in the complaint, which contain footage from many of the same locations as the "Meet Bruce Braley" video. See *Bruce Braley Stands With Iowa's Seniors*, https://www.youtube.com/watch?v=t1ZHVe_PbBY (last visited May 21, 2014); *Bruce Braley – Fighting for Iowa's Workers*, <https://www.youtube.com/watch?v=-NpUxs5wSq0> (last visited May 21, 2014); *Bruce Braley Will Stand Up for Women in Iowa* <https://www.youtube.com/watch?v=sRHZnyUfj6I> (last visited May 21, 2014). However, the videos referenced in the complaint were not used in SMP's advertisement.

candidate."¹¹ As the Commission has held on many occasions, not every third party use of candidate campaign materials is "republishing" under the Act.¹² While the "wholesale copying of candidate materials constitutes republishing," the "partial use of such materials in connection with one's own protected speech is not legally problematic."¹³

For example, the third party use of a photograph from a candidate's website does not constitute "republishing." In MUR 5743, Commissioners Weintraub and von Spakovsky rejected the argument that the use of a photograph from a candidate's website in a third party mailer constituted "republishing," concluding that to "treat an incidental republication of a photograph ... as an 'in-kind contribution' makes no intuitive sense."¹⁴ In MUR 5966, three additional Commissioners reached the same conclusion, finding that the use of a photograph from a candidate's website in a third party television advertisement is not "republishing," absent "some additional content or message" found in the photograph.¹⁵

In recent years, the Commission has unanimously dismissed several complaints involving allegations that third party groups "republished" candidate videos in their television ads. In MUR 5879, it was alleged that a Democratic Congressional Campaign Committee ("DCCC") advertisement featuring a fifteen-second excerpt of candidate b-roll footage was impermissible "republishing." When three Commissioners voted to find no reason to believe a violation occurred, they pointed to several factors. First, the advertisement was independent speech, which communicated the third party sponsor's own views rather than those of the candidate.¹⁶ Second, the background footage was silent and "contain[ed] no discernible message" of its own.¹⁷ Third, a contrary finding would hamper the ability of third party groups to run positive ads and "could perversely incentivize speakers to resort to the so-called 'negative advertising' that the sponsors of McCain-Feingold sought to discourage."¹⁸ Relying on similar reasoning, three Commissioners voted to find no reason to believe American Crossroads engaged in "republishing" when it used candidate footage in as much as half of a thirty-second advertisement supporting Senate candidate Rob Portman.¹⁹ In both cases, a deadlocked Commission then voted six to zero to dismiss the complaints.

¹¹ H.R. Rep. No. 94-1057, at 59 (1976) (Conf. Rep.).

¹² See, e.g., MUR 2722 (American Medical Association); MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee) (rejecting allegations of republishing).

¹³ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 5879 (DCCC) at 5.

¹⁴ Statement of Reasons of Commissioners Hans von Spakovsky and Ellen Weintraub, MUR 5743 (EMILY's List) at 4.

¹⁵ Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5996 (Education Finance Reform Group) at 3.

¹⁶ Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879 at 8.

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 6357 (American Crossroads).

When nearly identical republication complaints were filed against House Majority PAC in 2012 for advertisements that it ran in support of congressional candidate Christie Vilsack and now-Congresswoman Cheri Bustos, the Commission again dismissed them, with two Commissioners noting that "[t]hese matters present materially indistinguishable facts" from the DCCC and American Crossroads cases.²⁰ So, too, does this matter. SMP obtained the excerpts from a publicly available source. They appear on screen for less than half of the advertisement, in a different order than they appeared in their original source, and contain no discernible message of their own. They are background images, "incorporated into a communication in which [the respondent] add[ed] its own text, graphics, audio, and narration to create its own message."²¹ As a result, the advertisement supporting Congressman Braley is not "anything close to a carbon copy" of the Braley Committee video.²²

Finding a violation here, after not finding a violation in the previous MURs, would raise serious due process concerns. The Supreme Court has affirmed that "[w]hen speech is involved," agencies must demonstrate "rigorous adherence" to two related principles: that "regulated parties should know what is required of them so that they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."²³ The Commission has consistently voted to dismiss complaints alleging that the mere use of campaign photos or videos as background images was "republication." The Commissioners who voted to find "no reason to believe" in these matters "constitute a controlling group" and their Statements of Reasons, which "necessarily state[] the agency's reasons for acting as it did," are afforded the same deference as other agency decisions.²⁴ SMP reasonably relied on these precedents and engaged in materially indistinguishable conduct. Proceeding "in this case at this time would be unfair to [the respondent] because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against [respondent] but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances."²⁵

Finally, we note that the application of the republication standard to find that SMP has made a contribution to the Braley campaign has dubious statutory support. Under the Federal Election Campaign Act, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written,

²⁰ Statement of Reasons of Commissioners of Caroline C. Hunter and Matthew S. Petersen, MUR 6617 and 6667 at 1.

²¹ *Id.* (quoting Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 6357).

²² Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357 at 4.

²³ See *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012).


²⁴ *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471, 1476 (D.C. Cir. 1992)

²⁵ Statement of Reasons of Chairman David M. Mason and Commissioners Darryl R. Wold and Bradley A. Smith, MUR 4994 (NY Senate 2000) at 3. See also Statement of Reasons of Karl J. Sandstrom, MURs 4553, 4671, 4407, 4544, and 4713 at 2 ("The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech.").

graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be *an expenditure*²⁶ FEC regulations interpret this statutory provision to treat the "republishing of campaign materials" as an element of the "content prong" resulting in a contribution to the benefiting candidate.²⁷ It is not clear if the underlying statute can bear the weight of this regulatory interpretation where, as here, there is no allegation of coordination between the advertisement's sponsor and the candidate.

For the reasons set forth, the Commission should dismiss the complaint and close the file.

Very truly yours,


Marc E. Elias
Ezra W. Reese
Daniel B. Nudelman
Counsel to Senate Majority PAC

²⁶ 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added).

²⁷ 11 C.F.R. §§ 109.21(c)(2), 109.23. See also Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357 at 3, n. 6 (noting the "seeming incongruity" between the Act and regulations on this point); Statement of Reasons of Commissioners of Caroline C. Hunter and Matthew S. Petersen, MUR 6617 and 6667, n. 4 ("Any conclusion that non-coordinated republication constitutes a contribution (and thus, potentially a prohibited corporate contribution) is problematic under a straightforward reading of the Act's plain language."). The Commission need not resolve the inconsistency here, however, because the advertisement does not constitute the "republishing of campaign materials."